Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

MOUNTAIN WEST HELICOPTERS, LLC,

Petitioner,

v.

TEXTRON, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the purely economic loss doctrine, adopted by the court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), revisited in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) and followed by a strong majority of jurisdictions, including Idaho, contemplate recovery, in tort, of economic losses suffered by a helicopter owner resulting from a crash caused by the malfunction of a negligently designed and/or manufactured or unreasonably dangerous and defective part under circumstances where, in addition to causing the economic losses claimed, the malfunction implicates the tort concern with safety by also causing serious personal injury and/or damage to property other than to the defective product itself?

2. Does the Court's holding in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) apply where a defect, located in property added to the original product by a prior user, causes a malfunction that damages or destroys the original product introduced into commerce by the manufacturer. That is, does the *Saratoga Fishing* holding apply in reverse, i.e., when a defect in property added by a prior user (rather than the original product introduced into commerce by the manufacturer) causes a malfunction that subsequently damages or destroys the original product (rather than damaging or destroying property added by a prior user)? Is the resulting damage, nonetheless, damage to "other property" and recoverable in tort?

PARTIES BELOW

a. List of Parties Below

Textron, Inc. ("Textron"), the successor in interest to the Lycoming Division of Avco Corporation and the predecessor in interest to AlliedSignal, Inc. ("AlliedSignal") and Honeywell, Inc., is the only defendant/appellee/respondent remaining herein. All other defendants have been dismissed by stipulation, court order or settlement. References to Textron, herein, include its predecessors and successors in interest.

b. Corporate Disclosure Statement Under Rule 29.6

Mountain West Helicopters has no parent company and no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BELOW ii
- a. List of Parties Below ii
- b. Corporate Disclosure Statement Under Rule 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL OR STATUTORY PROVISIONS .. 1

STATEMENT OF THE CASE 1
- a. Nature of the Case 1
- b. Proceedings Below, Including a Statement of the Lower Courts' Jurisdiction 2
- c. Statement of Facts 3

REASONS FOR GRANTING THE WRIT 5
- a. Summary of Reasons for Granting the Writ 5
- b. Mountain West's Recovery Is Consistent with the Purely Economic Loss Doctrine and No Idaho Case Holds Otherwise 8
  1. A Brief History of the Purely Economic Loss Doctrine 8
  2. The Leading State Court Case on the Purely Economic Loss Doctrine, *Seely v. White Motor Company*, Would Award Mountain West

Damages 11
3. The Leading Purely Economic Loss Decision, *East River Steamship v. Transamerica Delaval*, Would Award Mountain West Damages .. 13
4. Mountain West's Claims Are Consistent with Idaho's Purely Economic Loss Doctrine and No Idaho Case Would Deprive Mountain West of its Damages When, in Addition to Causing Economic Loss, the Malfunction of a Defective Product Implicates the Tort Concern with Safety by Also Creating an Unreasonable Risk of Harm to Persons or Property Other than the Product Itself and Harm Materializes 15
c. The More Recent United States Supreme Court Decision, *Saratoga Fishing Co. v. J.M. Martinac*, Would Award Mountain West Damages 19
d. The Court Should Clarify the Confusion Created by the Competing Interpretations of *East River's* Purely Economic Loss Doctrine 22
1. The Confusion Relating to Whether a Business Entity May Recover Economic Losses, in Tort, Without Suffering Personal Injury 22
2. The Confusion Relating to Whether Economic Loss Is Recoverable under a Claim of Post-Sale Failure to Warn 29

CONCLUSION 30

APPENDIX 1a
a. The Court of Appeals' Opinion 1a
b. The Trial Court Opinion 5a
c. The Court of Appeals' Order Denying Mountain West's Petition for Rehearing . 11a

TABLE OF AUTHORITIES

a. Cases

Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) 30

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) 30

Brown v. Eurocopter S.A., 143 F.Supp.2d 781 (S.D. Texas 2001) 30

Clark v. International Harvester Co., 99 Idaho 326, 581 P.2d 784 (1978) 16, 17, 19

Comind, Companhia de Seguros v. Sikorsky Aircraft Division of United Technologies Corporation, 116 F.R.D. 397 (D. Conn. 1987) 27-29

Damin Aviation Corp. v. Sikorsky Aircraft, 705 F.Supp. 170 (S.D.N.Y.1989) 24

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) ... passim

East River S.S. v. Delaval Turbine, 752 F.2d 903 (3rd Cir. 1985) 6, 7, 15

Fouche v. Chrysler Motors Corporation, 103 Idaho 249, 646 P.2d 1020 (1982) 26

Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434 (10th Cir. 1992) 5, 25, 26

G&M Farms v. Funk Irrigation Company,
119 Idaho 514, 808 P.2d 851 (1991) 16, 18, 19

Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990) .. 6

Hiigel v. General Motors Corp., 190 Colo. 57,
544 P.2d 983 (1975) 25

J.M.F. Trucking, Inc. v. Carburetor & Electric of Lewiston, Inc., 113 Idaho 797. 748 P.2d 381 (1988) .. 18, 19

Lehman Brothers v. Schein, 416 U.S. 386,
94 S.Ct. 1741, 40 L.Ed.2d 215 (1974) 30

Lutz Farms v. Asgrow Seed Co., 948 F.2d 638
(10th Cir.1991) 26

Management Catalysts v. Turbo West Corpac and Piper Aircraft, 119 Idaho 626, 809 P.2d 487 (1991) .. 17, 18

Matsushita Elec. Industrial Co. v. Zenith Radio,
475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) 4

Miller Indus. v. Caterpillar Tractor Co.,
733 F.2d 813 (11th Cir.1984) 29, 30

Minneapolis Society of Fine Arts v. Parker-Klein Assoc. Architects, Inc., 354 N.W.2d 816 (Minn. 1984) ... 23

Myers v. A.O. Smith Harvestore Products, Inc.,
114 Idaho 432, 757 P.2d 695 (Idaho App. 1988) 16

Oats v. Nissan Motor Corporation, 126 Idaho 162,
879 P.2d 1095 (1994) 16, 26

Rammerth v. Hart, 133 Idaho 194,
983 P.2d 848 (1999) 3, 18

S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431 (Minn. 1985) 7, 22-24

Santor v. A.& M. Karagheusian, Inc., 44 N.J. 52,
207 A.2d 305 (1965) 9-11

Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875,
117 S.Ct. 1783, 138 L.Ed.2d 76 (1997) ..... i, 5, 19-22

Saratoga Fishing Co. v. Marco Seattle Inc.,
69 F.3d 1432 (9th Cir.1995) 20

Sea-Land Service, Inc. v. General Electric Co.,
134 F.3d 149 (3rd Cir.1998) 29

Seely v. White Motor Company, 63 Cal.2d 9,
45 Cal. Rptr. 17, 403 P.2d 145 (1965) ..... passim

Shields v. Morton Chemical Co., 95 Idaho 674,
518 P.2d 857 (1974) 26

Spring Motors Distributors v. Ford Motor Co.,
98 N.J. 555, 489 A.2d 660 (1985) 12

State v. Mitchell Construction Co., 108 Idaho 335,
699 P.2d 1349 (1985) 16

Superwood Corp. v. Siempelkamp Corp.,
311 N.W.2d 159 (Minn. 1981) 23

Tusch Enterprises v. Coffin, 113 Idaho 37,
740 P.2d 1022 (1987) 16

b. Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1291 3

28 U.S.C. § 1332 2

28 U.S.C. § 1407 2

28 U.S.C. § 1441 2

28 U.S.C. § 1446 2

c. Supreme Court Rules

Rule 10 5

d. Miscellaneous

32 Southwestern Law Journal 1 (1978) 7

Prosser & Keeton on the Law of Torts, § 92 (5th ed. 1984) . 6

Restatement (Second) of Torts, § 402A 25, 26

Restatement Third, Torts: Products Liability § 21 .. 1, 11, 19

W. Prosser, Handbook on the Law of Torts, § 101 (4th ed. 1971) 17

OPINIONS BELOW

The trial court's order granting Textron's motion for summary judgment is not published. Appendix ("App.") at 5a. The court of appeals' decision is also not published. App. at 1a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment July 11, 2001. It denied a petition for rehearing *en banc* August 8, 2001. App. at 11a. The court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS

No constitutional or statutory provisions apply to the resolution of this dispute. The purely economic loss doctrine is part of federal common law, adopted in admiralty jurisdiction.

> With admiralty jurisdiction comes the application of substantive admiralty law. (Citations omitted). Absent a relevant statute, the general maritime law, as developed by the judiciary applies. (Citations omitted). . . . [T]he general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.

East River, 476 U.S. at 864-865. "A strong majority of courts follow the *East River* [purely economic loss] rule. . . ," Restatement Third, Torts: Products Liability §21, *Comment d* at 298. The trial court found Idaho to be among the "majority," interpreted *East River* to disallow recovery of Mountain West's damages and concluded Idaho would do likewise despite no Idaho decision so holding. The Tenth Circuit affirmed "[f]or substantially the same reasons given by the district court. . . ."

STATEMENT OF THE CASE

a. Nature of the Case

This case, brought by Mountain West as the owner of a

Bell model UH-1L helicopter, is one of two cases asserting damages arising out of a September 18, 1995 crash near Grace, Idaho. The crash resulted from the "failure, by fatigue cracking, of the engine's centrifugal impeller." App. at 6a. Mountain West seeks damages for loss of the helicopter, profits lost under the contract it was performing, increased insurance premiums, and the like. Its employee/pilot, Charles Krause, sued, in Texas, seeking damages for personal injuries[1] suffered in the same crash. Mr. Krause's and Mountain West's cases asserted a right of recovery under product liability theories including strict liability in tort (alleging both design and manufacturing defects and failure to warn), negligence and breach of warranty.

b. Proceedings Below, Including a Statement of the Lower Courts' Jurisdiction

Mountain West sued in state court. Citing 28 U.S.C. §§ 1441(a) and 1446(d), defendants removed to Utah's federal court based on diversity jurisdiction (28 U.S.C. § 1332(a)(1)).

Relying upon the multidistrict litigation statute, 28 U.S.C. § 1407, defendants unsuccessfully moved to consolidate the two cases in Utah. Thereafter, Mr. Krause's personal injury action settled in the summer of 1999. A year later, the district court dismissed Mountain West's claims as prayed in Textron's motion for summary judgment premised upon the purely economic loss doctrine. The court's opinion notes:

> Textron argues that pursuant to Idaho law [Mountain West] cannot recover economic losses in products liability cases. In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476

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[1]Mr. Krause described the extent of his injuries, medical treatment and physical therapy at pages 50 through 62 of his deposition taken in the Texas case. Among other things, he suffered a burst fracture at thoracic vertebrae number 12, with resulting paralysis and loss of bowel, bladder and sexual function. Tenth Circuit App. at 154.

> U.S. 858 (1986), the Supreme Court denied recovery for economic loss in maritime cases holding that: "Since all but the very simplest of machines have component parts, [a contrary] holding would eliminate the distinction between warranty and strict products liability."[2] *Id.* at 867. . . . Idaho, along with many other states, ha[s] extended this ruling holding . . . that claims for economic loss may not be pursued in a tort action. See *Ramerth v. Hart*, 983 P.2d 848 (Idaho, 1999). . . .
>
> . . . [E]conomic loss is not recoverable in these circumstances and therefore Textron's Motion for Summary Judgment is granted. . . .

App. at 7a-8a (footnote supplied). The trial court also concluded, and the court of appeals also affirmed, that "Textron's Motion for Partial Summary Judgment regarding Failure to Warn is now MOOT." App. at 4a and10a.

Mountain West appealed under 28 U.S.C. § 1291. In the trial court Textron argued the law of Idaho applied. At the time of granting Textron's motion, the trial court ruled that Idaho law did apply. On appeal, Mountain West stipulated that Idaho law applied and moved the Tenth Circuit to certify certain questions to the Idaho Supreme Court.

The Tenth Circuit ruled "[f]or substantially the same reasons given by the district court, we agree that Idaho law does not permit Mountain West to recover its . . . damages in tort," affirmed the district court and denied Mountain West's motion to certify. App. at 4a.

c. Statement of Facts

"[O]n summary judgment the inferences to be drawn

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[2]As outlined in section IX(b)(3) below and with all due respect, the language quoted by the trial court is not the *East River* holding.

from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

1. On September 18, 1995, Mountain West's Bell model UH1L helicopter, FAA registration number N70410, (the "Helicopter"), engaged in helicopter logging operations near Grace, Idaho, suddenly lost all power and crashed.

2. The engine lost power due to "failure, by fatigue cracking, of . . . [its] centrifugal impeller." App. at 2a and 6a.

3. The resulting crash destroyed the Helicopter and seriously injured Mountain West's employee/pilot, Mr. Krause.

4. Mountain West purchased the Helicopter, about eight months earlier, from a prior user Scott Paper Company.

5. The Helicopter had a Textron Model T53-L-13B engine, with Serial Number LE18722B (the "Engine").

6. On the day of the crash, the Engine had a centrifugal impeller, part number 1-100-078-07G and serial number M346379 (the "Impeller" or "Centrifugal Impeller").

7. The Impeller was not part of the Helicopter or Engine when the respective manufacturers first introduced each into commerce. It became part of the Engine, on November 26, 1990, as a spare/replacement part, while under repair at the request of a prior user, Scott Paper Company, and was part of the Engine when Mountain West purchased the aircraft in 1995.

8. Textron negligently designed and manufactured the Impeller. It was also unreasonably dangerous and defective, having both design and manufacturing defects the existence of which Textron failed to warn Mountain West of. The design defect consisted of two unnecessary drain (weep) holes, drilled into the Impeller during manufacturing. By eliminating the holes from the Impeller design (which Textron has now done[3]), the manufacturer eliminated the risk of negligently

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[3]See Textron's response to Request for Admission No. 64. Tenth Circuit App. at 62-63.

manufacturing the holes contrary to the design specifications. The manufacturing defect lay in Textron's failure to meet design specifications applicable to this specific Impeller, when it failed to comply with a "63 micro finish smoothness" requirement applicable to the interior surfaces of the holes.

9. Because the holes did not meet the design specification, i.e., the standard of care, the Impeller had a higher propensity to develop cracks at the holes, it actually did develop cracks and when the cracks had grown to lengths that compromised the Impeller's structural integrity it failed, in flight, after only 3,157.4 flight hours of the manufacturer-established Impeller life limit of 25,000 flight hours.

REASONS FOR GRANTING THE WRIT

a. Summary of Reasons for Granting the Writ

Mountain West seeks review in this court, under Rule 10(c) of the Rules of the Supreme Court, because the decision rendered by the trial court and affirmed by the Tenth Circuit decides[4] an important question of federal law that the courts below believed Idaho would follow. The decision conflicts with Idaho Supreme Court cases, cited in section IX(b)(4) below, a prior Tenth Circuit case, *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992), and this court's decisions in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) and *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

Moreover, as noted below, under Rule 10(a) of the Rules of the Supreme Court, the Tenth Circuit ruling is now the subject of a split of authority among the courts of appeals. The Third Circuit has held, and this court affirmed its holding that, "damage . . . to a defective product *is* actionable in tort if the

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[4]Mountain West, with all due respect, suggests the trial court's decision and the court of appeals' affirmation are more accurately described as misinterpretations of an important question of federal law.

defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985). The Tenth Circuit now holds it is not actionable in tort.

Furthermore, the trial court also concluded, and the Tenth Circuit affirmed, that "Textron's Motion for Partial Summary Judgment regarding Failure to Warn is now MOOT." App. at 10a. The question whether *East River's* purely economic loss rule renders moot or, otherwise, defeats a post-sale failure to warn claim is, as noted in section IX(d)(2), also the subject of an existing conflict among the courts of appeals.

There is much debate over the correct interpretation of the purely economic loss doctrine. The dissent in *Hapka v. Paquin Farms*, 458 N.W.2d 683, 689 (Minn. 1990) notes the doctrine "involves the complex and confusing area of the law where contract and tort overlap" to remedy the same harm. Dean Keeton confirms "[t]he availability of both [tort and contract] . . . liability for precisely the same kind of harm has brought about confusion and unnecessary complexity." Prosser & Keeton on the Law of Torts, § 92 at 655 (5th ed. 1984).

Mountain West submits both the trial court and the Tenth Circuit misapprehend the meaning of the purely economic loss doctrine. It does not prevent recovery when the same defect that implicates the tort concern with safety, by causing personal injury or damage to property other than the defective product itself, also causes economic loss. At best, the doctrine precludes tort recovery only "when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *East River*, 476 U.S. at 859 (emphasis supplied). That was the *only* issue answered in *East River* and "[w]hen a product injures only itself the reasons for imposing a tort duty are weak. . . . The *tort concern with safety* is reduced when an injury is only to the product itself." *East River* at 871 (emphasis supplied).

East River, as noted above, recognizes "damage solely

to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied), citing and affirming *East River S.S. v. Delaval Turbine*, 752 F.2d 903 (3rd Cir. 1985). It is also the essence of Mountain West's petition.

Dean Keeton recognizes and supports the position Mountain West asserts herein.

> A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms *only the product* should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage *limited solely to the property*, recovery should be available . . . on a contract-warranty theory.

32 Southwestern Law Journal 1, 5 (1978) (emphasis supplied). Commenting on Dean Keeton's statement, the dissent in *S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn. 1985) notes the "requirement that there be damage to other property or personal injury is simply a shorthand way of determining whether a defect is part of the 'accident problem' against which tort law seeks to protect." *Id.* at 436. Here, the serious personal injuries suffered by Mountain West's employee/pilot establish the "accident problem" or the "unreasonable risk of harm to persons." Moreover, the Impeller malfunction, rendering the Engine powerless and, in the "accident," causing the total loss of the Helicopter and Engine, also evidences the "accident problem" and the "unreasonable

risk of harm to property other than the product itself."

The purely economic loss doctrine, adopted in *East River* and recognized in Idaho, does not reject Mountain West's claims when, without warning, a negligently designed and manufactured or dangerously defective Impeller malfunctions in a sudden and calamitous fashion, and in addition to causing economic loss, "creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes."

b. Mountain West's Recovery Is Consistent with the Purely Economic Loss Doctrine and No Idaho Case Holds Otherwise

1. A Brief History of the Purely Economic Loss Doctrine

The purely economic loss doctrine developed over the last approximately 35 years. Textron, quoting the *East River* holding independent of the context of the much narrower issue addressed and the Third Circuit holding affirmed, contends the doctrine's essence is "whether stated in negligence or strict-liability, no products-liability claim lies . . . when the only injury claimed is economic loss." *East River* at 876. Since Mountain West claims only economic loss, Textron contends and the lower courts agree, Mountain West has no tort claim.

Mountain West, in contrast, contends the doctrine applies "when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *Id.* at 859 (emphasis supplied). Since this malfunctioning Impeller injured more than "only the defective product" and caused more than "purely economic loss," Mountain West claims entitlement to tort damages.

The leading exposition of the doctrine is *East River*.[5] In contrast to this dispute, in *East River* this court addressed the

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[5]At page10 of its brief in the Tenth Circuit, Textron acknowledges *East River* is "the leading case. . . ."

limited issue "whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring *only* the product itself and causing *purely* economic loss." *East River* at 859 (emphasis supplied). Addressing that narrow[6] issue, this court held "a manufacturer . . . has no duty under either . . . negligence or strict products-liability . . . to prevent a product from injuring itself." *East River* at 871. Hence, "whether stated in negligence or strict-liability, no products-liability claim lies . . . when the only injury claimed is economic loss." *Id.* at 876.

Mountain West respectfully suggests the purely economic loss doctrine applies, by definition, when the malfunctioning product causes "purely economic loss." *East River* recognizes "since by definition *no person or other property is damaged*, the resulting loss is purely economic." *East River* at 870 (emphasis supplied). The doctrine does not apply when the malfunction causes more than "purely economic loss." This malfunction also caused serious personal injury and damage, i.e., physical harm, to property other than the Impeller.

While *East River* brought national scrutiny to the purely economic loss issue, the problem pre-dates *East River*. In *Santor v. A.& M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) and *Seely v. White Motor Company*, 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965), the New Jersey and California supreme courts also addressed the purely economic loss issue.

> If the article is defective . . . and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists. . . . If . . . the defect

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[6]Notably, a footnote to the holding reads: "We do not reach the issue whether a tort cause of action can ever be stated . . . when the only damages sought are economic." *Id.* at 871, n.6.

is chargeable to the manufacturer, his must be the responsibility for the . . . damage or injury.

Santor, 207 A.2d at 313. The New Jersey court likewise noted:

> . . . [A]lthough the doctrine [of strict liability in tort] has been applied principally in connection with personal injuries sustained by expected users from products which are dangerous when defective, we reiterate . . . that the responsibility of the maker should be no different where damage to the article sold or to other property of the consumer is involved.

Id. at 312. Four months after New Jersey's *Santor* decision, Justice Traynor and the California Supreme Court articulated the following disagreement with the *Santor* rationale.

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held liable for the level of performance of his products . . . unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged . . . with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will

not meet his economic expectations unless the manufacturer agrees that it will.

Seely, 403 P.2d at 151.

More than twenty years later, *East River* evaluated the New Jersey and California approaches to the purely economic loss issue. Noting that *Santor* "held . . . a manufacturer's duty to make nondefective products encompassed injury to the product itself, *whether or not the defect created an unreasonable risk of harm*," 476 U.S. at 868-869 (emphasis supplied), a unanimous Supreme Court rejected *Santor* and "adopt[ed] an approach similar to *Seely*. . . ." *Id.* at 871.

The contrary results reached by the Supreme Courts of New Jersey and California, combined with the limited application, in terms of binding precedent, of a United States Supreme Court admiralty decision, have combined to allow continuing disagreement as to the proper interpretation of the purely economic loss doctrine. Moreover, while Justice Traynor identifies Mountain West as one of the "lucky" plaintiffs victimized by "an accident causing physical injury," neither court below has found Mountain West to be so "lucky." Since this court adopted an approach similar to *Seely*, understanding the issue begins with an understanding of *Seely*.

2. The Leading State Court Case on the Purely Economic Loss Doctrine, *Seely v. White Motor Company*, Would Award Mountain West Damages

Seely v. White Motor Company, 63 Cal.2d 9, 403 P.2d 145 (1965), the leading[7] state case on the doctrine, recognizes Mountain West's claims. In addition to articulating the distinct tort/safety and contract/performance duties a manufacturer

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[7]Restatement Third, Torts: Products Liability § 21 at page 299 identifies *Seely* as "the leading state court case. . . ."

undertakes, as recited above, *Seely* expressly recognizes Mountain West's right to recover, in strict liability, for physical injury to the Helicopter caused by a defect contained therein.

> [Mr. Seely] contends that, even though the law of warranty governs . . . economic relations . . . strict liability in tort should be extended to govern physical injury to [his truck]. . . . *We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason for distinguishing them.* (Citations omitted.) In this case, however, the trial court found . . . no proof that the defect caused the physical damage of the truck.

Seely at 152 (emphasis supplied). Mr. Seely did not recover, in tort, for the damage to his truck, because he failed to prove that a defective condition attributable to the manufacturer, White Motor Company, caused the accident![8] *Spring Motors Distributors v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), commenting on *Seely*, notes "[a]lthough the truck had been damaged, the [California Supreme] court sustained a finding . . . that defendant had not created the defect that caused the damage." 489 A.2d at 669. Under *Seely*, Mountain West recovers, in tort, for the destruction of its Helicopter by proving that Textron is responsible for the defect that caused the crash!

Moreover, Justice Traynor's distinction between "physical injuries caused by defects [that fail] to match a standard of safety defined in terms of conditions that create unreasonable risks of harm," and defects that merely render products unable to satisfy "economic expectations," is the same

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[8] *Seely* describes the defect as a "galloping" condition, i.e., the truck "bounced violently." 403 P.2d at 147. ". . . [The dealer], with guidance from [the manufacturer] . . . made many unsuccessful attempts to correct the galloping." *Id.* The accident, however, was not caused by the "galloping" defect. It occurred because "the brakes did not work." *Id.*

distinction between the manufacturer's tort duty where the product "creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes," and its contract duty when the product merely does not perform or underperforms without creating an unreasonable risk of harm and without such harm materializing. *East River* recognizes the "claim of a nonworking product can [and should] be brought as a . . . warranty action." *East River* at 872.

3. The Leading Purely Economic Loss Decision, *East River Steamship v. Transamerica Delaval*, Would Award Mountain West Damages

In *East River* this court depended heavily on *Seely*, reiterating, with approval, the distinction between the tort and contract duties undertaken by the manufacturer.

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on . . . the nature of the responsibility a manufacturer must undertake in distributing his products.

East River at 871, citing *Seely*, 403 P.2d at 151.

The *Seely* distinction did not give rise to a tort duty in *East River* because the defective turbine did not produce "an accident causing physical injury," did not create "unreasonable risk of harm to persons or property other than the product itself," nor did any such "harm materialize." Rather, when the *East River* "turbine malfunctioned . . . [t]he ship, though lacking its normal power, was able to continue on its journey to Panama and then San Francisco." *East River*, 476 U.S. at 860. The malfunction only caused the turbine to underperform. Without a tort duty "for the level of performance of his products in the

consumer's business," *Seely*, 403 P.2d at 151, the manufacturer has no liability in tort.

In contrast, when a negligently designed and/or manufactured or unreasonably dangerous and defective product, including this Impeller or the *East River* turbine, leads to "physical injuries caused by defects [that fail] to match a standard of safety defined in terms of conditions that create unreasonable risks of harm," tort recovery, including tort recovery for economic loss, is entirely appropriate. "For . . . reasons of safety, the manufacturer's duty of care . . . include[s] protection against property damage." *East River* at 867. However, since the *East River* malfunctioning turbine did not implicate the tort concern with safety, it is, in the *Seely* vernacular, merely an"economic expectations" or inadequate quality case. As the third circuit recognized, *en banc*:

> The nature of the defect in this case appears qualitative, as opposed to safety related. . . . *Unlike the defect in those cases in which tort recovery is allowed for a damaged product*, the defect in this case is not intimately related to the safety of the product, nor is it associated with calamitous events like fire or sudden collision.
>
> . . .[T]he manner in which the damage to the turbine occurred implicates the expectation-bargain policy of warranty law rather than the safety-insurance policy of tort law.
>
> . . . [W]e must consider the type of risk . . . that is inherent in this type of qualitative defect. . . . [T]he defect did not pose a risk of sudden or calamitous injury to persons or property. Instead, the risk created by the defect was that the turbine would operate at a lower capacity. . . . We believe that this type of risk, rather than implicating a manufacturer's obligation to place safe products in the stream of

> commerce, only concerns the charterer's *expectations* as to the commercial suitability of the product. . . . [T]he defective turbine did not pose an unreasonable risk of harm to persons or property, and thus . . . the charterers have failed to state a cause of action in tort.

East River S.S. v. Delaval Turbine, 752 F.2d 903, 909 (3rd Cir. 1985) (emphasis supplied).

This court's *East River* decision unanimously affirmed the Third Circuit's judgment for Delaval acknowledging "[t]he Court of Appeals held that damage solely to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River* at 862 (emphasis supplied). Thus, under *East River*, Mountain West's claims are "actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." Mr. Krause's serious personal injuries and the total loss of Mountain West's Helicopter are the facts establishing Mountain West's right to recover in tort.

4. Mountain West's Claims Are Consistent with Idaho's Purely Economic Loss Doctrine and No Idaho Case Would Deprive Mountain West of its Damages When, in Addition to Causing Economic Loss, the Malfunction of a Defective Product Implicates the Tort Concern with Safety by Also Creating an Unreasonable Risk of Harm to Persons or Property Other than the Product Itself and Harm Materializes

No less than six Idaho decisions, five from its Supreme Court and one from its Court of Appeals, quote, as an accurate

statement of Idaho law, the tort/contract distinction articulated by Justice Traynor, in *Seely*, and reaffirmed by this court, in *East River*.[9] The first case to do so was *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Clark cites Justice Traynor's majority opinion in *Seely* as "[o]ne of the most fully articulated discussions of the considerations underlying this [purely economic loss] rule." *Clark*, 581 P.2d at 792. Moreover, *Clark* confirms "[t]he distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury." *Id.*, citing *Seely*, 403 P.2d at 151. *Clark* also affirms the manufacturer of a defective product "can appropriately be held liable [in tort] for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm." *Id.* And finally, *Clark* recognizes while a consumer "can . . . be fairly charged with the risk that the product will not meet his economic expectations," that same consumer "should not be charged at the will of the manufacturer with bearing the risk of physical injury. . . ." *Id.*

Clark also quotes Dean Prosser, with approval, for the "majority rule" that damages *are* recoverable in tort "when an automobile is wrecked by reason of its own bad brakes" (or a Helicopter is wrecked by reason of its own bad Impeller).

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[9]The Idaho Supreme Court cases quoting Justice Traynor's language include, in order of decision: *Clark v. International Harvester Co.*, 99 Idaho 326, 334, 581 P.2d 784, 792 (1978); *State v. Mitchell Construction Co.*, 108 Idaho 335, 343, 699 P.2d 1349, 1357 (1985); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *G&M Farms v. Funk Irrigation Company*, 119 Idaho 514, 536, 808 P.2d 851, 873 (1991); and *Oats v. Nissan Motor Corporation*, 126 Idaho 162, 171, 879 P.2d 1095,1104 (1994). The Court of Appeals decision is *Myers v. A.O. Smith Harvestore Products, Inc.*, 114 Idaho 432, 436, 757 P.2d 695, 699 (Idaho App. 1988).

> Dean Prosser summarized this majority rule with respect to recovery of economic losses . . . in negligence as follows:
>
> > '. . . [L]iability for negligence covers any kind of physical harm, including not only personal injuries, but also *property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes*. . . . But where there is *no accident*, and *no physical damage*, and the only loss is a pecuniary one. . . , the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence. . . .' W. Prosser, Handbook on the Law of Torts, § 101 at 665 (4th ed. 1971).

Clark, 581 P.2d at 791. *Clark*, like *East River*, is another "economic expectations/poor performance" case. The defective "push rods in the engine" malfunctioned causing a "loss of power" and rendering "the tractor . . . not able to plow a sufficient number of acres per hour for it to be economically practical to operate." 581 P.2d at 788. No risk to persons or other property was created and no physical harm materialized.

Indeed, all of the Idaho cases applying the purely economic loss doctrine are "economic expectations" cases. Justice Bistline's dissent in *Management Catalysts v. Turbo West Corpac and Piper Aircraft*, 119 Idaho 626, 809 P.2d 487 (1991) notes the "[Idaho] cases have dealt with product failures which simply failed to meet buyers' expectations." The "factor . . . of the potential for calamitous personal injury or property

damage . . . was not present in any of the line of Idaho cases which . . . lead to the denial of economic injury in unintentional tort cases." *Id.* at 492.

The only case cited in the opinions of the courts below, as a basis for the Idaho purely economic loss doctrine, is *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999). *Ramerth* does not even cite or analyze the leading purely economic loss cases, *Seely* and *East River*, much less recognize the tort/contract distinction articulated therein and in the Idaho cases identified above. Moreover, *Ramerth* is simply another economic expectations case. The alleged negligent repair and inspection of an airplane did not involve the malfunction of a defective product, did not cause an accident and did not create an unreasonable risk of harm to persons or property other than the product itself nor did that harm materialize. The damages sought were the costs associated with repeating the repairs, to do them right, "as well as lost 'custom spraying profits' for the period when the airplane was being repaired." *Ramerth* at 850.

Two Idaho cases, *J.M.F. Trucking, Inc. v. Carburetor & Electric of Lewiston, Inc.*, 113 Idaho 797, 748 P.2d 381 (1988) and *G&M Farms v. Funk Irrigation Company*, 119 Idaho 514, 808 P.2d 851 (1991), indicate Idaho would award Mountain West damages. In *J.M.F. Trucking* "forty-one days after purchase . . . , a fire began under the dashboard . . . and [a] truck was destroyed. J.M.F. filed suit against [the manufacturer] Freightliner on warranty, negligence and *strict product liability* theories." *J.M.F. Trucking*, 748 P.2d at 382 (emphasis supplied). The Idaho Supreme Court decision notes the trial court "found that the truck was delivered with defective wiring . . . [and] awarded $71,338.85 (. . . the cost of replacing the truck minus $5000 salvage value). In sum, the trial court held for J.M.F. on warranty and *strict liability* grounds." *Id.* (Emphasis supplied). However, the court noted a deficiency, similar to *Seely*, in "the trial court's failure to rule as to which of several possible causes of the fire was, in fact, the cause." *Id.*

Facing a trial court decision lacking clear findings, i.e.,

the trial court did not find that the manufacturer was responsible for the defect that caused the total loss of the truck, the Idaho Supreme Court reversed and remanded. Nevertheless, it recognized a right to recover damages, in strict liability, when a truck is wrecked by reason of its own bad wiring (or a helicopter is wrecked by reason of its own bad impeller). "A finding of causation is imperative to any ruling holding one strictly liable in products liability, as it must be proved that the defect . . . caused the injury or damage." *Id.* at 383.

G&M Farms recognizes Idaho "held in *Clark* that *unless* there was injury to persons or property as a result of the malfunction of a product, there was no justifiable reason for expanding tort law to cover purely economic losses. . . . [T]he Uniform Commercial Code, and . . . *Clark v. International Harvester*, 99 Idaho 326, 581 P.2d 784 (1978), precludes a products liability action sounding in tort under these circumstances where there is no personal injury or damage to property alleged." *Id.* at 864 (emphasis supplied). In contrast, when the malfunction causes such injury there is justifiable reason for expanding tort law to cover economic losses.

c. The More Recent United States Supreme Court Decision, *Saratoga Fishing Co. v. J.M. Martinac*, Would Award Mountain West Damages

The Restatement Third, Torts: Products Liability §21, *Comment d* at 298 recognizes "[a] strong majority of courts follow the *East River* [purely economic loss] rule . . . and it is likely that these courts will follow *Saratoga* as well."[10] *Saratoga Fishing* recognizes that in order to decide whether a defective product "creates an unreasonable risk of harm to . . . property other than the product itself," one must first decide

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[10]Mountain West knows of no Idaho decision that has yet decided whether Idaho would follow the *Saratoga Fishing* rationale.

what is the "product itself?" Neither court below answered the question but the court of appeals' opinion notes "Mountain West . . . purchased the helicopter, with the engine and centrifugal impeller already installed. . . ." App. at 2a.

The Impeller that was part of the Helicopter and Engine both when Mountain West purchased from Scott Paper and on the day of the crash, was not the same impeller installed in the Engine or the Helicopter originally introduced by the respective manufacturers into the stream of commerce. Nonetheless, the inference to be gathered from the Tenth Circuit's decision is the "product itself" is the Helicopter, including the Engine and defective Impeller. Thus, when the Impeller malfunctioned, destroying the Engine and Helicopter, there was no damage to "property other than the product itself." If this is the Tenth Circuit's decision, then it ruled as the Ninth Circuit did in *Saratoga Fishing Co. v. Marco Seattle Inc.*, 69 F.3d 1432 (9th Cir.1995). This court reversed the Ninth Circuit in *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997).

> In *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), the Court held that an admiralty tort plaintiff cannot recover for the physical damage the defective product causes to the "product itself"; but the plaintiff can recover for physical damage the product causes to "other property." . . . This case asks how . . . tort law treats the physical destruction of . . . equipment (a skiff, a fishing net, *spare parts*)[11] added by the initial user after the first sale and then resold as part of the ship. . . . Is that added equipment part of the "product

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[11] Judge Noonan's concurring and dissenting opinion in the court of appeals notes the added property included "the skiff, seine net, fuel, *spare parts* and other miscellaneous equipment sold by [the prior user] to Saratoga Fishing. . . ." 69 F.3d at 1447 (emphasis supplied).

> itself" . . . [o]r is it "other property. . . ?" We conclude that it is "other property. . . ."
>
> The Ninth Circuit . . . noted that the equipment . . . was part of the ship when Madruga resold the ship to Saratoga Fishing, and . . . held the added equipment was part of the defective product that itself caused the harm. . . . [Thus] . . . the majority concluded that Saratoga Fishing could not recover in tort. . . . A dissenting judge believed that the "product itself" was the ship when launched into the stream of commerce by Martinac, its original builder. Consequently, the added equipment was "other property." . . . We now agree with the dissenting judge.

Saratoga Fishing at 876-878 (emphasis and footnote supplied).

> When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under *East River*. Items added to the product . . . are therefore "other property," and the Initial User's sale of the product . . . does not change these characterizations.

Id. at 879. The defective Impeller, undisputedly manufactured by Textron and ultimately sold as a spare/replacement part to Scott Paper, is an "item added to the product . . . after the first sale and then resold as part of the [Helicopter or Engine]. . . ."[12]

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[12]The only distinction between the facts of *Saratoga Fishing* and this dispute lies in the location of the defect. The *Saratoga Fishing* defect was found in the original product and this defect was found in the added property. *Saratoga Fishing* applies, nonetheless. Property added to the original product after the manufacturer introduces it into the stream of commerce, by "selling it to an Initial User," is "other property" and vice versa. Neither opinion below disputes this.

Under *Saratoga Fishing*, an item added to the product is "other property" and "[Scott Paper's] sale of the product [to Mountain West] . . . does not change these characterizations." Thus, tort rules permit recovery.

d. The Court Should Clarify the Confusion Created by the Competing Interpretations of *East River's* Purely Economic Loss Doctrine

Two issues cause more than their share of confusion in this "complex and confusing" area of the law. First, the issue whether a defect, the failure of which occurs in a fashion that implicates safety, justifies the recovery of economic losses in tort or whether recovery is limited to those economic losses caused by actual personal injury, e.g., lost income. Second, whether the tort claim arising from a manufacturer's post-sale failure to warn may justify recovery of economic losses.

1. The Confusion Relating to Whether a Business Entity May Recover Economic Losses, in Tort, Without Suffering Personal Injury

In the courts below, Textron contended economic losses are recoverable in tort only to the extent they arise from personal injury. A business entity, such as Mountain West, cannot suffer personal injury, hence, Textron argues, Mountain West may not recover economic losses in tort. Textron cites two[13] reported decisions supporting the argument.

In *S.J. Groves & Sons v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431 (Minn.1985) a helicopter was badly damaged in an accident that killed the pilot and injured a passenger. The crash was allegedly caused by the fatigue failure of a component in the collective pitch. Once the rotor blades lost their pitch, there was no force acting to keep the helicopter

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[13]Mountain West believes these are the only two such cases.

aloft, and it crashed. See 374 N.W. 2d at 432. A majority of the Minnesota Supreme Court denied recovery for loss of the helicopter noting "damage–to the defective product itself–is not ordinarily recoverable in tort because a product's unsatisfactory performance is the type of problem that warranty law and the U.C.C. were designed to remedy." *S.J. Groves* at 434. Justice Coyne did not participate in the *en banc* decision and Justice Yetka joined in Justice Scott's dissenting opinion contending:

> The majority misinterprets *Superwood*.[14] . . . The question certified[15] to us asks whether "economic losses" arising from the crash of the helicopter can be recovered under strict liability or negligence. I would answer the certified question in the affirmative. A reading of *Superwood* allowing Groves to recover for damage to the helicopter itself in this case is consistent with the clear *majority view*, as well as with our previous statement in *Society of Fine Arts*.[16] Groves should also be allowed to recover for lost profits and loss of use damages resulting from . . . the damage to the helicopter. Such losses resulted from a "*sudden and catastrophic occurrence*" – a *tortious* event – and thus should also be compensable in tort.

S.J. Groves at 435-436 (emphasis and footnotes supplied). Notably, *S.J. Groves* did not interpret the leading purely

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[14] *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981).

[15] *S.J. Groves* "involve[d] a question certified to [the Minnesota Supreme] court by the Federal District Court of Minnesota. . . ." 374 N.W. 2d at 432.

[16] *Minneapolis Society of Fine Arts v. Parker-Klein Assoc. Architects, Inc.*, 354 N.W.2d 816 (Minn. 1984).

economic loss decision since this court had not yet decided *East River*. Moreover, only the dissent quotes from *Seely* noting:

> For most courts adopting *Seely*, the line drawn between contract and tort damages . . . falls between damage resulting merely from deterioration, internal breakage, depreciation, or failure to live up to the expectation and damage which is sudden and calamitous, resulting from a violent or hazardous accident.

S.J. Groves, 374 N.W.2d at 436.

In *Damin Aviation Corp. v. Sikorsky Aircraft*, 705 F.Supp. 170 (S.D.N.Y.1989), a helicopter operated by Damin, consisting of an airframe manufactured by Sikorsky and an engine manufactured by Allison, crashed at Fort Dix, New Jersey causing the death of the copilot, serious injury to the pilot and total loss of the helicopter. The crash occurred after explosive engine failure . . . [took] out the other engine. . . , the tail rotor, drive shaft and the back-up electronic system leaving the helicopter powerless and without controls. *Id.* at 171.

Applying New Jersey law, the United States District Court declined to award Damin the economic losses it sought. *Id.* at 176. However, damages for the loss of the Helicopter were not an issue. "Soon after the crash, Damin's insurer paid Damin $3,495,000 for the loss of the Helicopter. In November of 1984, the insurer for Sikorsky and Allison reimbursed Damin's insurer for the entire amount which entirely covered the purchase of another . . . helicopter. . . [!]" 705 F.Supp. at 171. Contrary to Textron (or its insurers), the insurers for Sikorsky and Allison recognized their insured's liability for dangerous defects. Moreover, *Damin Aviation* not only fails to analyze *Seely* and *East River*, it does note cite them!

In the courts below Mountain West cited two helicopter crash cases supporting its claims to recover economic losses in tort. Remarkably, one of those cases comes from the Tenth Circuit yet the court of appeals' decision makes no attempt to

distinguish, discuss or even cite it. In *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992), a helicopter crash caused the death of the pilot, William Paton, and the total loss of Four Corners' helicopter. The helicopter engine overheated, causing the crash. *Id.* at 1435-36.

Four Corners, seeking economic losses, and Jenny Paton, seeking damages for the wrongful death of her husband/pilot, joined together as plaintiffs to pursue claims against the engine manufacturer, Turbomeca. The trial court awarded damages to both and the Tenth Circuit affirmed noting:

> Turbomeca contends that the district court erred in permitting recovery of economic damages under . . . strict liability. . . .
>
> . . . It claims that because Four Corners is a commercial user which lost the value of its product, Four Corners should be limited to a cause of action under warranty. . . .
>
> Turbomeca cites *East River S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) for the proposition that a commercial plaintiff's damages for economic losses are not recoverable in a strict liability action. . . . Turbomeca contends that Colorado follows the *East River* rationale. . . .
>
> As a federal court sitting in diversity, we are required to apply Colorado law. . . .
>
> In *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), the Colorado Supreme Court adopted § 402A of the Restatement (Second) of Torts. Section 402A provides that damage to a product itself is

covered under the doctrine of strict liability.[17]

> . . . The instant case does not fall within the purview of the *East River* decision. As the Ninth Circuit has indicated, *East River* holds "that a cause of action for breach of warranty, not a products liability claim, lies for damage to a defective product, *unless damage is caused to persons or property other than the product itself.*" (Citations omitted). This court has similarly discussed *East River*, indicating that "the Supreme Court stated . . . no products liability claim lies in admiralty when a commercial party alleges **injury only to the product itself** resulting in **purely economic loss**." *Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 643 (10th Cir.1991). . . . We hold that, under applicable Colorado law, Four Corners *is* entitled to recover under strict liability for loss of the helicopter.

Id. at 1442-44 (footnote and emphasis in *italics* supplied; emphasis in **bold** in original).

In the crash of yet another helicopter, off the coast of Brazil (hence, the application of admiralty law), the United States district court for the district of Connecticut considered these issues twice–first on the initial motion for summary judgment and a second time following the court's order granting

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[17] In "*Shields v. Morton Chemical Co.*, 95 Idaho 674, 518 P.2d 857, 859 (1974) . . . the Idaho Supreme Court [also] adopted the Restatement (Second) of Torts § 402A (1965), imposing strict liability for 'any product in a defective condition unreasonably dangerous to the user or consumer. . . .'" *Fouche v. Chrysler Motors Corporation*, 103 Idaho 249, 646 P.2d 1020, 1021-1022 (1982). "Section 402A establishes the strict liability of sellers of products for physical harm to users or consumers of those products." *Oats v. Nissan Motor Corporation*, 126 Idaho 162, 879 P.2d 1095, 1104 (1994).

a motion to reconsider. *Comind, Companhia de Seguros v. Sikorsky Aircraft Division of United Technologies Corporation*, 116 F.R.D. 397 (D. Conn. 1987) carefully analyzes *East River* and recognizes Mountain West's right to recover in tort. The helicopter, insured by Comind, crashed following the fatigue failure of the "bearing inner race" that held the helicopter's blades in place. The part failure caused the crash, the resulting deaths of 14 persons and the total loss of the helicopter. *Id.* at 400-401. Addressing defendants' motion for summary judgment, on January 14, 1987, the court first ruled:

> In *East River Steamship*, the Court considered whether liability should be imposed . . . in three paradigmatic situations: First, in cases where the defective product malfunctions and inflicts personal injury on a user or third party; second, in cases where the defective product malfunctions and could have inflicted injury on a user or third party but did not (the "near-miss" scenario); and third, where the defective product malfunctions but poses no threat of physical injury to users or third parties (the "disappointed but unharmed" user scenario). The Court held that liability . . . under . . . negligence or products liability could only be imposed in the first paradigm. . . .
>
> . . . [This] Court finds that the accident involving the helicopter at issue here falls within the first category of paradigmatic cases. . . . Because lives were lost in the accident allegedly due to a defect in the bearing inner race, Comind's claim is not . . . an action for economic damages only [or purely economic loss]. The plaintiff's claim arises from the same accident that took the lives of the helicopter's passengers and crew. Accordingly, the plaintiff

is not barred from bringing its tort claims. . . .

The Court therefore denies the defendants' motion for summary judgment. . . .

Comind, 116 F.R.D. at 416-417. After granting defendants' motion to reconsider, the court ruled again on July 14, 1987.

> . . . [D]efendants begin with the argument that *East River Steamship* stands for the proposition that economic injury is never recoverable . . . for tort-based claims, even when the accident giving rise to the claim also took the lives of several human victims. *East River* . . . does not say this. . . . [T]he specifics of the Court's holding are that 'a manufacturer in a commercial relationship has no duty . . . [in] negligence or strict products liability . . . to prevent a product from injuring itself.' (Citations omitted). Rightfully so as an economic obligation to ensure mere satisfactory product performance is best governed by the salutary principles of warranty. However, in the present case, the product not only . . . destroyed itself, but took with it the lives of its passengers and crew. Thus the duty implicated here is the quite different responsibility to manufacture a reasonably safe product, not merely an obligation to ensure . . . that the product functions in the bargained for manner.
>
> . . . [W]hile it is true that situations involving near-misses or disappointed users may not properly give rise to cognizable tort claims . . . , *situations involving personal injury as a result of product defect lie at the very heart of negligence and strict products liability concerns*. Parties injured as a result of this latter type of product disaster are entitled to lay full

> claim to the salutary liability rules embodied in negligence and strict products-liability concepts. . . . Thus, *for cases falling within the range of the personal injury-causing defect scenario, liability may be imposed for personal as well as economic damages where the duty to manufacture reasonably safe products has been breached under either negligence or strict products-liability rationales.* In . . . situations involving . . . life and death, the superior suitability of tort . . . becomes readily apparent.

Id. at 423-424 (emphasis supplied).

2. The Confusion Relating to Whether Economic Loss Is Recoverable under a Claim of Post-Sale Failure to Warn

The Eleventh Circuit has held that *East River's* purely economic loss doctrine does not prevent a claim for post-sale failure to warn. *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 818 (11th Cir.1984). The Third Circuit (and now the Tenth also) has held that it does. See *Sea-Land Service, Inc. v. General Electric Co.*, 134 F.3d 149, 155-56 (3rd Cir.1998). This split of authority caused one trial court to note:

> The Eleventh Circuit correctly perceived . . . that a post-sale duty to warn of defects "goes not to the quality of the product that the buyer expects from the bargain, but to the type of conduct which tort law governs as a matter of social and public policy." (Citations omitted). . . . [W]hen it comes to post-sale failure to warn, the reasons for imposing a tort duty to warn are strong and those for leaving the party to its contractual remedies are weak. "To hold otherwise would impermissibly allow a manufacturer . . . aware that it has a defective

> product on the market to hide behind its warranty while the buyer unknowingly uses it."

Brown v. Eurocopter S.A., 143 F.Supp.2d 781, 783 (S.D. Texas 2001), citing *Miller Indus.*, 733 F.2d at 818. Both the tort concern with safety and duty to warn of unreasonably dangerous and defective products justify Mountain West's tort claims.

CONCLUSION

Federal courts act as "'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). "'Speculation by a federal court about the meaning of . . . state [law] . . . in the absence of prior state court adjudication is particularly gratuitous when . . . state courts stand willing to address questions of state law on certification from a federal court.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997), quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'CONNOR, J., concurring). Though certification "rests in the sound discretion of the federal court," doing so "helps build a cooperative judicial federalism." *Lehman Brothers v. Schein*, 416 U.S. at 391. For the reasons stated herein and to achieve a cooperative judicial federalism, Mountain West respectfully seeks the courts order granting its petition and, at minimum, certifying these "complex and confusing" questions of law to the state of Idaho.

Respectfully submitted,

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED JULY 11, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 00-4151
(D. Ct. No. 97-CV-887-K)
(D. Utah)

MOUNTAIN WEST HELICOPTERS,
a Utah Limited Liability Company,

Plaintiff – Appellant,

v.

TEXTRON, INC., doing business as Textron Lycoming Overseas Corp., a Delaware corporation; ALLIEDSIGNAL, INC., a Delaware corporation,

Defendants – Appellees,

and

MCTURBINE, INC., a Texas corporation; PUEBLO AIRMOTIVE, INC., an Arizona corporation; GARLICK HELICOPTERS, INC., a Montana corporation; SCOTT PAPER, a Delaware corporation,

Defendants.

Appendix A

ORDER AND JUDGMENT*

Before **TACHA**, Chief Judge, **ANDERSON**, and **MURPHY**, Circuit Judges.

Appellant, Mountain West Helicopters, appeals the district court's grant of summary judgment in favor of Appellee, Textron, Inc.[1] We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

On September 18, 1995, a military surplus UH-1L helicopter owned by Mountain West crashed near Grace, Idaho. At the time, Mountain West was operating the helicopter in Idaho in its logging operations. The helicopter's pilot, a Mountain West employee, was seriously injured in the crash. The helicopter was equipped with a T53-L-13B engine originally manufactured for the United States Army by Avco Corporation, the predecessor of Textron. The crash was caused by a loss of power in the engine that was in turn caused by the failure of the engine's centrifugal impeller.

Mountain West had purchased the helicopter, with the engine and centrifugal impeller already installed as

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1. Appellee is variously referred to in this case as Textron, Inc. and AlliedSignal, Inc. For purposes of this order and judgment, we refer to the appellee as Textron, Inc.

components, from Scott Paper Company[2] approximately nine months before the accident. In 1990, while Scott Paper owned the helicopter, a replacement centrifugal impeller, also manufactured by Textron, had been installed. The replacement impeller was the impeller that later failed and caused the 1995 crash. Mountain West purchased the helicopter "as is" from Scott Paper. The purchase agreement clearly stated that all express or implied warranties were excluded.

Mountain West filed this lawsuit in Utah state court to recover the following economic losses it allegedly suffered as a result of the crash: (1) the value of the helicopter; (2) increased worker's compensation premiums allegedly incurred because of the crash; (3) increased aviation hull and liability insurance premiums allegedly incurred because of the crash; (4) a year's worth of insurance premium payed for the crashed helicopter; (5) penalties paid to contractors when Mountain West was unable to perform its logging obligations because of the crash; and (6) lost profits on contracts Mountain West was unable to complete because of the crash. Mountain West's suit sounded in tort and advanced a theory of strict product liability. Defendant Scott Paper removed the case to the United States District Court for the District of Utah pursuant to federal diversity jurisdiction. Textron filed for summary judgment arguing that purely economic damages are not recoverable in a products liability lawsuit under Idaho law. The district court agreed and granted summary judgment against Mountain West on all of its claims against Textron. This appeal followed.

---

2. Scott Paper Company was also a defendant in the lawsuit filed by Mountain West, however; this appeal deals exclusively with Mountain West's claims against Textron.

II.

We review a "grant of summary judgment de novo applying the same standards used by the district court." *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The question now on appeal is whether Mountain West can recover in tort for purely economic damages. The parties have stipulated that Idaho law applies to this dispute. Therefore, the limited question before us is whether, under Idaho law, Mountain West can recover in tort for purely economic damages. For substantially the same reasons given by the district court, we agree that Idaho law does not permit Mountain West to recover its alleged damages in tort.

Accordingly, the district court's grant of Appellee's motion for summary judgment is AFFIRMED. Mountain West has additionally moved to have the question certified to the Idaho Supreme Court. Further, Textron has moved to strike references made by Mountain West to any settlement between Textron and the helicopter's pilot. The motion to certify is DENIED and the motion to strike is GRANTED.

ENTERED FOR THE COURT,

Deanell Reece Tacha
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AUGUST 8, 2000 AND FILED AUGUST 9, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:97-CV-887K

MOUNTAIN WEST HELICOPTERS, LLC,

Plaintiff,

v.

TEXTRON, INC., et al.,

Defendants.

ORDER

This matter is before the court on defendant AlliedSignal/ Textron's ("Textron") Motion for Summary Judgment; defendant Scott Paper Company's Motion for Summary Judgment; Textron's Motion to Strike and Textron's Objection to Magistrate's Ruling. The matter came on for hearing on Monday, August 7, 2000. The plaintiff was represented by Mr. Robert S. Young. Defendant Textron was represented by Mr. J. Christian Moller and Mr. Tracy H. Fowler. Defendant Scott Paper Company was represented by Mr. Michael H. Hull. Oral argument was heard and the matter was taken under advisement. The court has considered all

pleadings, memoranda, and other materials submitted by the parties. The court has further considered the law and facts relevant to the parties' motions. Now being fully advised, the court enters the following order.

I. Background

Plaintiff, Mountain West Helicopter, is a Utah Limited Liability Company. It has sued Textron, Scott Paper Company and others for product liability damages arising out of the September 18, 1995 crash of a military surplus UH-1L helicopter near Grace, Idaho due to the failure, by fatigue cracking, of the engine's centrifugal impeller.[1] At the time of the crash, the helicopter was engaged in hauling logs, in support of a contract that plaintiff had to perform logging in a forest in Idaho. Textron has brought two motions for summary judgment. The first is on the issue of damages and the second is for partial summary judgment on plaintiff's claims for Failure to Warn. Scott Paper Company has joined in Textron's Motion for Summary Judgment regarding damages.

II. Discussion

Plaintiff's claims include several categories of damages including the value of the helicopter; the balance of the insurance premium for the remainder of the premium year; increases in its workers' compensation premiums; increases in its hull and aviation liability premiums; costs it allegedly

1. All other defendants in this matter have been dismissed previously.

had to pay because it could not complete the contract; and lost profits. In its Motion for Summary Judgment Textron argues that damages to the helicopter are "economic losses" and are not recoverable in product liability actions under applicable law, and that damages relating to insurance issues are too tenuous to be imputed to Textron.

This court agrees with the defendant that Idaho law applies in this action. The *Restatement (Second) of Conflict of Laws* § 147 states that:

> In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.

There is no other state that has a more significant relationship than Idaho to the subject matter of this case. The place where the injury occurred was clearly Idaho. The helicopter was in Idaho fulfilling a contract and had been working solely in Idaho for two months prior to the accident. Although the location of aviation crashes is frequently characterized as "fortuitous", that characterization is more properly applied to interstate flights. When an aircraft is used for a period of time within the border of a specific state, and then crashes in that state as is the case here, it is not fortuitous.

Textron argues that pursuant to Idaho law the plaintiff cannot recover economic losses in products liability cases.

In *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), the Supreme Court denied recovery for economic loss in maritime case holding that: "Since all but the very simplest of machines have component parts, [a contrary] holding would eliminate the distinction between warranty and strict products liability." *Id.* at 867. The courts of Idaho, along with many other states, have extended this ruling holding in several contexts that claims for economic loss may not be pursued in a tort action. *See Ramerth v. Hart*, 983 P.2d 848 (Idaho, 1999) in which the Idaho Supreme Court held that an aircraft owner who sued a mechanic in negligence for damage to the aircraft's engine and airframe allegedly caused by the mechanic's improper repairs were "purely economic loss," for which no recovery could be had in tort.

Plaintiff argues that this matter falls into an exception to the general rule that purely economic loss cannot be recovered in tort. Specifically plaintiff argues that courts have recognized an exception when there is an actual injury that arises from the accident resulting in the economic loss. Plaintiff cites to *Duffin v. Idaho Crop Improvement Association*, 895 P.2d 1195 (Idaho 1995). However, *Duffin* states only in dicta that "economic loss is recoverable in tort as a loss parasitic to an injury to person or property". This is not the case at hand. Although the pilot of the helicopter was injured, the economic loss was not parasitic to the pilot's injury. The law is clear that economic loss is not recoverable in these circumstances and therefore Textron's Motion for Summary Judgment is granted as to the issue of economic loss.

Textron further argues that plaintiff cannot recover damages for increased insurance costs, lost premiums,

increases costs and lost profits. This court agrees. As for the lost premiums, the helicopter crashed shortly after the insurance premium for the year had been paid. Plaintiff argues that Textron is liable for the value of the remainder of the premium. The general rule in insurance law provides that an insured may not have any part of its premiums returned once the risk to the insurer attaches. Further, if plaintiff were entitled to a return of some percentage of its premium, that entitlement would be governed by its policy with the insurance carrier who is not a party to this action. Further, plaintiff cannot recover increased insurance costs including workers' compensation premiums in that the loss claimed is too remote to be charged to a third party tortfeaser. This same theory applies to plaintiff's claims regarding an increase in its hull insurance and aviation liability premiums following the accident. Increased premiums are simply too remote to be chargeable to third-party tortfeasers.

Lastly, this court grants summary judgment in favor of Textron as to the issue of increased costs and lost profits. There was not any contractual relationship between plaintiff and Textron and therefore these damages were not reasonably foreseeable. Further, plaintiff has not supplied any documentation to support its claims for lost profits.

Defendant Scott Paper Company has joined in Textron's Motion for Summary Judgment as to economic loss and insurance related damages. This motion is granted pursuant to the stipulation of the parties. The remaining issue regarding whether or not Scott Paper Company will be included on the special verdict form is moot in light of the court's ruling granting Textron's Motion for Summary Judgment. Further,

Textron's Motion for Summary Judgment as to Failure to Warn is also moot in light of the court's ruling. Lastly, Textron's Motion to strike plaintiff's expert report is denied as moot and Textron's Objection to the Magistrate's ruling on discovery issues is denied as moot.

Textron has further moved this court to strike plaintiff's discussion, in its briefs, of the settlement agreement between defendant and the pilot of the helicopter. This motion is granted pursuant to rule 408 of the Rules of Evidence.

For the reasons stated herein it is hereby

ORDERED that Textron's Motion for Summary Judgment regarding damages is GRANTED in its entirety. Textron's Motion for Partial Summary Judgment regarding Failure to Warn is now MOOT. Scott Paper Company's Motion for Summary Judgment regarding damages is also GRANTED in its entirety. Textron's Motion to Strike discussion of settlement agreement is GRANTED and its Motion to Strike expert reports is DENIED as MOOT. Lastly, Textron's Objection to Magistrate's Ruling is DENIED as MOOT.

This matter is DISMISSED with prejudice. Each party to bear its own costs.

DATED this 8th day of August, 2000.

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 8, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 00-4151

MOUNTAIN WEST HELICOPTERS,
a Utah Limited Liability Company,

Plaintiff – Appellant,

v.

TEXTRON, INC., doing business as Textron Lycoming Overseas Corp., a Delaware corporation; ALLIEDSIGNAL, INC., a Delaware corporation,

Defendants – Appellees,

and

MCTURBINE, INC., a Texas corporation; PUEBLO AIRMOTIVE, INC., an Arizona corporation; GARLICK HELICOPTERS, INC., a Montana corporation; SCOTT PAPER, a Delaware corporation,

Defendants.

ORDER

Filed August 8, 2001

Appendix C

Before **TACHA**, Chief Judge, **ANDERSON**, and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing en banc is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ K. Fabrizio
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 27 2001
CLERK

(2)

No. 01-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MOUNTAIN WEST HELICOPTERS, LLC,

Petitioner,

v.

TEXTRON INC. and
HONEYWELL INTERNATIONAL INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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9pp

QUESTIONS PRESENTED

I

Should this Court review an issue of tort law that the parties have agreed is governed by the common law of the state of Idaho, when the decision of the circuit court below was unanimous and is uncontradicted by any decisions of Idaho's state courts?

PARTIES TO THE PROCEEDINGS BELOW

The following parties to the proceedings in the district court were dismissed before that court entered judgment against Petitioner:

1. McTurbine, Inc.
2. Pueblo Airmotive, Inc., and
3. Garlick Helicopters, Inc.

The following party settled with Petitioner while the case was on appeal to the Tenth Circuit:

1. Scott Paper Company (which had been merged into Kimberly-Clark Corporation).

CORPORATE DISCLOSURE STATEMENT

Textron Inc., the identified defendant/respondent sold its interest in the Lycoming Turbine Engine Division of Avco Corporation to AlliedSignal Inc. in 1994, and AlliedSignal assumed the liabilities associated with this case. In 1999, AlliedSignal Inc. became, by merger, Honeywell International Inc. Honeywell, as a respondent, is the real party in interest.

Textron Inc. has no parent corporation. More than ten percent of its stock is owned by Putnam Fiduciary Stock Company, a subsidiary of Marsh & McLennan Companies, Inc. More than ten percent is also owned by FMR Corp.

Honeywell International Inc. has no parent corporation. No shareholder owns more than ten percent of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDINGS BELOW..... ii

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS iii

OPINIONS BELOW..... 1

JURISDICTION OF THIS COURT..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT.....2

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Braxton v. United States, 500 U.S. 344 (1991) 3

East River S.S. Co. v. Transamerica Delaval Inc.,
476 U.S. 858 (1986) 3

Four Corners Helicopters, Inc. v. Turbomeca, S.A.,
979 F.2d 1434 (10th Cir. 1992) 3

G&M Farms v. Funk Irrigation Co.,
119 Idaho 514, 808 P.2d 851 (Idaho 1991) 3

Haring v. Prosise, 462 U.S. 306 (1983) 2

*J.M.F. Trucking, Inc. v. Carburetor &
Elec. of Lewiston, Inc.*,
113 Idaho 797, 748 P.2d 381 (Idaho 1988) 3

Miller Indus. v. Caterpillar Tractor Co.,
733 F.2d 813 (11th Cir. 1984) 3

Ohio v. Wyandotte, 401 U.S. 493 (1971) 2

Ruhlin v. New York Life Ins. Co.,
304 U.S. 202 (1938) 4

Saratoga Fishing Co. v. J.M. Martinac & Co.,
520 U.S. 875 (1997) 3

Sea-Land Serv., Inc. v. General Elec. Co.,
134 F.3d 149 (3d Cir. 1998) 3

Statutes

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The opinion of the district court and the court of appeals are reproduced in the appendices to the Petition.

JURISDICTION OF THIS COURT

This Court has jurisdiction of this case, provided that the Petition was filed on time. 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner bought a military surplus UH-1L helicopter—commonly known as a "Huey"—from Scott Paper Company, which had been using the aircraft for hauling logs from its timber harvest lands. The contract of sale specified that the helicopter was sold "as is" and without any warranties. Petitioner also used the helicopter to haul logs—a mission for which it was neither designed nor intended. While engaged in this activity in a forest in Idaho, far from any navigable waters, the helicopter suffered a loss of engine power and crashed. The pilot was seriously injured, and the helicopter was a total loss.

The Lycoming Turbine Engine Division of Avco Corporation had originally manufactured the engine and sold it to the military in 1969. Avco was later acquired by Textron Inc., which eventually sold the Turbine Engine Division to AlliedSignal Inc., which has since become, by merger, Honeywell International Inc. For ease of reference, these entities are referred to collectively in this brief as "Respondents."

Petitioner sued several defendants in Utah state court and sought the value of the helicopter, plus various consequential losses. Petitioner asserted claims for negligence, strict products

liability, and various breaches of warranty. The defendants removed the case to federal court. Respondents moved to dismiss the case on the grounds that (1) Utah's choice-of-law rules would select the law of Idaho as the rule of decision and (2) Idaho classified Petitioner's claims for damage to its helicopter, plus its consequential damages, as economic loss for which there is no recovery in tort. The district court granted Respondents' motion.

Petitioner appealed to the Tenth Circuit and stipulated during the appeal that the tort issues it raised were governed by Idaho law. Petition at 3, App. 4a. The Tenth Circuit affirmed and denied Petitioner's petition for rehearing en banc. A petition for certiorari to this Court followed.

REASONS FOR DENYING THE WRIT

Because the parties agreed that the case below was governed by Idaho law, the questions presented by petitioner were decided under the common law of torts of the state of Idaho. This Court typically does not decide issues of state law that have been determined by a federal appellate court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Ohio v. Wyandotte*, 401 U.S. 493, 497-98 (1971) ("This Court's paramount responsibilities to the national system lie almost without exception in the domain of federal law. . . . We have no claim to special competence in dealing with the numerous conflicts between States and nonresident individuals that raise no serious issues of federal law").

Petitioner concedes that the Idaho decisions on economic loss involve lost "economic expectations," not physical damage to

the product at issue. Petition at 17. The district court's and the Tenth Circuit's determinations that Idaho law would deny recovery for such physical damage therefore do not conflict with the decisions of the courts of Idaho. Petitioner cites two additional Idaho cases as conflicting with the rulings against it by the lower courts. But those cases do not present any such conflict. In the first, *J.M.F. Trucking, Inc. v. Carburetor & Elec. of Lewiston, Inc.*, 113 Idaho 797, 748 P.2d 381 (Idaho 1988), the economic loss rule was neither raised by the parties nor discussed anywhere in the opinion. The second case, *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (Idaho 1991), involved no physical property damage, but rather the failure of a sprinkler system to meet a buyer's expectations, and the claims being appealed involved misrepresentation, not product liability.

The conflict suggested by Petitioner of the decision below with other circuit court decisions is illusory. The cases identified by Petitioner as a source of conflict arose under the laws of jurisdictions other than Idaho. *See Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997) (general maritime law); *East River S.S. Co. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) (general maritime law); *Sea-Land Serv., Inc. v. General Elec. Co.*, 134 F.3d 149 (3d Cir. 1998) (general maritime law); *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992) (Colorado law); *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984) (general maritime law). Consequently, they represent, at most, the different policies applied to a common question of tort law by different states and, in maritime cases, by the federal government. It is the business of this Court to decide conflicts between the circuit courts over their interpretations of federal law. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A

principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). No provision of the Constitution, the U.S. Code or this Court's rules empowers the Court to referee simple differences in tort policy among the states. *See Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts").

CONCLUSION

The Petition presents no issue of federal law, no conflict with established Idaho law, no true split among the circuits, and no question that merits this Court's review. The Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 11 2002
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No. 01-728

IN THE
Supreme Court of the United States

MOUNTAIN WEST HELICOPTERS, LLC,

Petitioner,

v.

TEXTRON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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8 pp

QUESTIONS PRESENTED IN REPLY

1. Does a substantial federal question arise when a federal district court interprets federal law, in the form of the leading purely economic loss doctrine decision, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), in conflict with decisions of the third circuit court of appeals and this court, opines that the highest court of Idaho would follow that conflicting interpretation, and, thereafter, the court of appeals, "[f]or substantially the same reasons given by the district court," affirms the district court's conflicting interpretation, without further elaboration, and denies a motion to certify to Idaho the question whether it would follow the conflicting interpretation.

TABLE OF CONTENTS

QUESTIONS PRESENTED IN REPLY i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 4

TABLE OF AUTHORITIES

a. Cases

Braxton v. United States, 500 U.S. 344 (1991) 2

East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) ..... passim

East River S.S. v. Delaval Turbine, 752 F.2d 903 (3rd Cir. 1985) 3, 4

b. Miscellaneous

32 Southwestern Law Journal 1 (1978) 5

Restatement Third, Torts: Products Liability § 21 3

REASONS FOR GRANTING THE WRIT

Textron does not challenge the merits of Mountain West's Petition. Instead it contends the "Petition presents no issue of federal law, no conflict with established Idaho law, no *true* split among the circuits, and no question that merits this court's review." Respondent's brief at 4 (emphasis supplied). Believing most of these issues are adequately addressed in the initial Petition for Writ of Certiorari, Mountain West focuses this reply brief on whether the Petition presents a substantial issue of federal law in the context of whether there is a split among the circuit courts, in their interpretation of federal law, that merits this court's review.

Mountain West submits a substantial issue of federal law arises when: (1) a federal district court interprets federal law, i.e, *East River* the leading purely economic loss doctrine decision, in a manner that conflicts with decisions both of the third circuit court of appeals and this court and then opines the highest court of Idaho will follow that conflicting interpretation; (2) thereafter the tenth circuit court of appeals affirms "for substantially the same reasons given by the district court," without additional elaboration and in spite of tenth circuit authority interpreting *East River* to the contrary; and (3) the court of appeals then also refuses to certify to Idaho, the question whether that state's highest court would follow an interpretation of federal law that conflicts with the majority position of *East River*.

This is a case wherein the district court articulated the only reviewable holding. The court of appeals made no holding but affirmed "for substantially the same reasons given by the district court." The substance of the holding follows.

> Textron argues that pursuant to Idaho law [Mountain West] cannot recover economic losses in products liability cases. In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the Supreme Court denied

> recovery for economic loss in maritime cases holding that: "Since all but the very simplest of machines have component parts, [a contrary] holding would eliminate the distinction between warranty and strict products liability." *Id.* at 867. . . . Idaho, along with many other states, ha[s] extended this ruling holding . . . that claims for economic loss may not be pursued in a tort action. . . .
>
> . . . [E]conomic loss is not recoverable in these circumstances and therefore Textron's Motion for Summary Judgment is granted. . . .

App. at 7a-8a.

The trial court's conclusion, affirmed by the court of appeals, interprets federal law, in the form of *East River*, and then opines that Idaho will follow that interpretation. Textron acknowledges "[i]t is the business of this court to decide conflicts between the circuit courts over their interpretations of federal law." Respondent's brief at 3, citing *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

The district court's holding and the court of appeals' affirmation, in light of the facts relevant to this dispute, interpret federal law, in the form of *East River*, to stand for the proposition that damage caused to a defective product is not actionable in tort even if, as occurred here, the defect implicates the tort concern with safety by creating an unreasonable risk of harm to persons or property other than the product itself, and that harm actually materializes.

The trial court's interpretation of *East River*, affirmed by the tenth circuit court of appeals, conflicts with a third circuit decision, as this court recognized (and unanimously affirmed), holding that "damage . . . to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons

or property other than the product itself, and harm materializes." *East River*, 476 U.S. at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985).

The conflict, despite Textron's argument, is not illusory. It does not merely "represent . . . the different policies applied to a common question of tort law by different states and, in maritime cases, by the federal government." Respondent's brief at 3. Textron cites no Idaho decision (because no such decision exists) purporting to demonstrate that the tort policy of Idaho differs from the tort policy expressed in *East River*. Indeed the trial court concluded Idaho would follow *East River*.

The Restatement Third, Torts: Products Liability §21, *Comment d* at 297 recognizes *East River* is "the leading decision. . . ." At page10 of its tenth circuit brief Textron, in an assertion that it now appears to distance itself from, argues that *East River* is "the leading case barring recovery in tort for damage that a product does to itself. . . ." *East River* establishes that Textron's argument applies when the defective product does not implicate the tort concern with safety, by creating an unreasonable risk of harm to persons or property other than the product itself. Textron's argument does not apply, as *East River* recognizes, "when the defect creates an unreasonable risk of harm to persons or property other than the product itself, and [as occurred here] harm materializes." There is simply no question that *East River* is the case courts look to for guidance as to the majority position. "A strong majority of courts follow the *East River* [purely economic loss] rule. . . ." Restatement Third, Torts: Products Liability §21, *Comment d* at 298. The district court cited and quoted from *East River* in support of the decision it rendered herein.

Mountain West's inability to recover damages arises from a district court interpretation of *East River* in conflict with a third circuit decision that this court subsequently unanimously affirmed. The Petition for Certiorari asks the court to decide, among other things, a conflict between the third and tenth

circuit courts pertaining to their respective interpretations of federal law in the form of *East River*.

And finally, Textron makes much of the question whether this court should "review an issue of tort law . . . governed by the common law of the state of Idaho, when the decision of the circuit court below was unanimous. . . ." Respondent's brief at i. Not only was the court of appeals' decision unanimous, but it also agreed with the decision of the trial court. Hence the unanimity lies among four judges, not just the court of appeals' panel. Those four judges unanimously agreed, among other things, that damage to a defective product is not actionable in tort even if, as occurred here, the defect implicates the tort concern with safety by creating an unreasonable risk of harm to persons or property other than the product itself, and harm materializes.

A similarly unanimous court affirmed a third circuit holding that "damage . . . to a defective product *is* actionable in tort if the defect creates an unreasonable risk of harm to persons or property other than the product itself, and harm materializes." *East River*, 476 U.S. at 862 (emphasis supplied), citing *East River S.S. v. Delaval Turbine*, 752 F.2d 903, 908, 909-910 (3rd Cir. 1985). These two unanimous, but conflicting, decisions, of course, give rise to the question who is unanimously right and who is unanimously wrong?

CONCLUSION

As Dean Keeton recognized:

> A distinction should be made between the type of "dangerous condition" that causes damage only to the product itself and the type that is dangerous to other property or persons. A hazardous product that has harmed something or someone can be labeled as part of the accident problem; tort law seeks to protect against this type of harm through allocation of risk. In contrast, a damaging event that harms *only the*

> *product* should be treated as irrelevant to policy considerations directing liability placement in tort. Consequently, if a defect causes damage *limited solely to the property*, recovery should be available . . . on a contract-warranty theory.

32 Southwestern Law Journal 1, 5 (1978) (emphasis supplied). The damage caused by this hazardous product was not limited "only to the product itself" but included damage to "other property or persons" as well. Tort law seeks to protect against this type of harm through allocation of risk.

This court is the last opportunity Mountain West will have to obtain a correct interpretation of *East River*, a decision followed by a strong majority of jurisdictions, including, as the trial court recognized here, the state of Idaho. The correct interpretation of *East River* distinguishes between the hazardous product that harms something or someone, giving rise to tort claims, and the hazardous product that harms only the product itself, giving rise only to claims for breach of contract. Mountain West respectfully seeks the court's order granting its petition in order to resolve the conflicting interpretations of federal law as contained in the leading purely economic loss decision, *East River S.S. Corp. v. Transamerica Delaval, Inc.*

Respectfully submitted,

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